

Are Justice and Harmony Mutually Exclusive?

A Response to Professor Nader

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I. INTRODUCTION

In *Controlling Processes in the Practice of Law*,¹ Professor Laura Nader faults mediation for advancing a harmony ideology defined as the “use of a rhetoric of peace through consensus” which she sees as becoming pervasive in American life.²

Professor Nader states, first, that harmony ideology is “accompanied by an intolerance for conflict” and implies that the suppression of discord is its goal.³ When harmony is exalted, society views compromise as more noble than the vindication of rights,⁴ presumably even when the participants to the conflict are forced to compromise against their wills. In short, she equates harmony with repression. Second, she views the traditional adversarial litigation system, in which individual rights are guaranteed by the Constitution and enforced by activist lawyers, as protective of society.⁵ She sees modern society currently at risk of being controlled by covert, hidden legal processes.⁶ In particular, she perceives the expanding use of mediation, usually a confidential process, as posing a grave danger to justice. She is especially concerned that mediation further disadvantages women, minorities, and the poor.⁷ In an attempt to support the theory that mediation is inherently repressive, Professor Nader notes that powerful members of the legal profession generated the early discussions of the

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¹ Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993).

² *Id.* at 1-2.

³ *Id.* at 3.

⁴ *Id.*

⁵ *Id.* at 1.

⁶ Nader, *supra* note 1, at 2.

⁷ *Id.* at 3.

possible benefits of alternatives to litigation.⁸ Presumably, the fact that influential members of the establishment promoted mediation indicates its adoption will suit their purposes of preserving the status quo by inhibiting protection of private rights. She further notes that lawyers have accepted the validity of mediation rhetoric without question, abandoning their traditional role as guardians of justice in the adversary system. She tries to draw an analogy between the acceptance of mediation by the legal profession and the hierarchical suppression of criticism by associates of working conditions in large law firms.⁹ All Professor Nader's assertions are subject to differing interpretations.

Professor Nader confuses the suppression of conflict through indirect attitudinal controls with the attempted resolution of conflict through mediation. Certainly, our society attempts to encourage conformity and suppress criticism by social controls. However, once conflict is expressed and a remedy demanded, these attempts have already failed. The conflict can no longer be contained; it must be addressed. To resolve the dispute, one must determine what process should be used. The specific question is whether mediation is an unfair dispute resolution process, however fairness is defined.

To a great extent, the argument about which dispute resolution process is inherently superior is rooted in the clash of competing values. Our society exists in a state of constant tension between the assertion of individual rights and the need for compromise and cooperation in order to maintain group functioning. The choice of an appropriate dispute resolution process is situational, not a question of right or wrong. It will depend upon the nature of the conflict and the people involved. Although mediation encourages compromise and cooperative problem solving, it is not usually a tool for repression. The conclusion that mediation is more likely to suppress than resolve conflict rests on a misunderstanding of the process and purpose of mediation.

This Article begins by questioning Professor Nader's theory that mediation is a vehicle used by powerful members of society to repress criticism. The next sections discuss the mediation process, public policy issues concerning mediation, and power imbalances. Finally, the issue of lawyer submission to the rhetoric of alternative dispute resolution is addressed.

A. The History of Mediation and the Conspiracy Theory

In three observations, Professor Nader finds support for her contention

⁸ Nader, *supra* note 1, at 6.

⁹ *Id.* at 1.

that a small group of powerful attorneys and policy makers are forcing the populace to accept mediation, rather than litigation, of disputes in order to repress the assertion of rights incompatible with the status quo — a hidden agenda of repressive thought control.

First, to support her thesis that mediation is being forced upon the populace from the top down, Professor Nader notes that Chief Justice Warren Burger and other jurists began to criticize the litigious nature of American society at the 1976 Pound Conference on the causes of dissatisfaction with the American justice system. The conference focused on replacing adversarial procedures with alternative dispute resolution.¹⁰ Mediation was one of the ideas proposed to improve the legal system.¹¹ Soon, she argues, trial attorneys, federal judges, and even lawyers who had been activists for the poor were influenced by the ideas of the legal elite and joined the anti-litigation crusade.¹²

It is certainly true that some members of the legal profession began to encourage the use of alternatives to adversarial litigation at the Pound Conference.¹³ However, the movement in favor of non-traditional forms of dispute resolution came from other sources as well.

Mediation was also on the agenda of a group of people concerned about the breakdown of communities. This group promoted the establishment of local dispute resolution centers with the hope of facilitating a renewed sense of neighborhood cohesion and decentralization of social control.¹⁴ The

¹⁰ Nader, *supra* note 1, at 5. The term alternative dispute resolution includes, but is not limited, to mediation. Other processes included under the general rubric of ADR include arbitration, early neutral evaluation, and mini-trials. These other processes differ from mediation and pose different policy questions. This article focuses on mediation.

¹¹ Frank E.A. Sander, *Varieties of Dispute Processing*, in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 65, 67, 74-76, 80 (A. Leo Levin & Russell R. Wheeler eds., 1979).

¹² Nader, *supra* note 1, at 2.

¹³ Hon. Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, in *THE POUND CONFERENCE*, *supra* note 11, at 23, 33-34; *See also* Sander, *supra* note 11, at 65. Chief Justice Burger suggested community panels could be used to resolve small claims, and that greater use of arbitration should be considered. Professor Sander's presentation focused on examining alternatives to traditional litigation. The Conference assumed the existence of problems with the justice system, as reflected in language in the subtitle, "Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice."

¹⁴ *See, e.g.*, NANCY H. ROGERS & CRAIG A. McEWEN, *MEDIATION: LAW, POLICY, PRACTICE* § 4.2 (1989); CENTER FOR COMMUNITY JUSTICE 5, 6 (1982); Sally E. Merry, *Defining "Success" in the Neighborhood Justice Movement*, in *NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA* 172, 181 (Roman Tomasic & Malcolm M. Feeley eds.,

people involved in the community mediation movement tended to come from the ministry and the helping professions. The focus of this movement was not merely on creating alternatives to court, but also on peacemaking and reconciliation, often rooted in religious beliefs.¹⁵ These proponents of mediation did not share Chief Justice Burger's agenda for court reform, and often wished to avoid tying mediation too closely to the courts.¹⁶

It is impossible to prove or disprove Professor Nader's theory that mediation is being pushed onto the populace by a conspiracy of powerful members of the legal profession in order to suppress conflict. Although part of the impetus toward mediation came from influential, powerful members of the bar and the judiciary,¹⁷ people from other walks of life, with different agendas, independently began to see merit in alternatives to the adversarial trial system. Momentum for alternative dispute resolution came from several professional arenas at approximately the same time. Professor Nader briefly notes other sources of the movement toward mediation, but discounts their import.¹⁸

The Pound Conference participants were drawn primarily from the federal courts, high state courts, bar associations, and legal academia.¹⁹ The use of alternative dispute resolution in domestic relations cases was touched on, but not emphasized.²⁰ In the years following the conference, however, the use of divorce mediation expanded significantly.²¹ Supporters of family mediation believed that adjudication of custody disputes was a destructive way to resolve disputes over the care of minor children. Mediation was viewed as more likely than trial to allow full discussion and accommodation of the parents' underlying concerns. Mediated settlements were perceived as more responsive than court orders to the family's needs.²² The growing

1982); Roman Tomasic, *Mediation as an Alternative to Adjudication: Rhetoric and Reality in the Neighborhood Justice Movement*, in NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA 215, 230 (Roman Tomasic & Malcolm M. Feeley eds., 1982).

¹⁵ See JENNIFER E. BEER, FRIENDS SUBURBAN PROJECT, PEACEMAKING IN YOUR NEIGHBORHOOD 2, 3 (1986); RONALD S. KRAYBILL, REPAIRING THE BREACH: MINISTERING IN COMMUNITY CONFLICT 7, 8 (1981).

¹⁶ BEER, *supra* note 15, at 204-05, 225.

¹⁷ More detailed information and analysis of the backgrounds of legal professionals promoting mediation may reveal many different, even conflicting purposes served by assisted settlement negotiations.

¹⁸ Nader, *supra* note 1, at 7.

¹⁹ THE POUND CONFERENCE, PERSPECTIVES ON JUSTICE IN THE FUTURE App. C. (A. Leo Levin & Russell R. Wheeler eds., 1979) [hereinafter THE POUND CONFERENCE].

²⁰ Sander, *supra* note 11, at 76; Burger, *supra* note 13, at 33-34.

²¹ ROGERS & MCEWEN, *supra* note 14, § 4.3.

²² Jay Folberg, *Mediation of Child Custody Disputes*, 19 COLUM. J.L. & SOC. PROBS.

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acceptance of mediation had significant interdisciplinary support.²³ Although attorneys are far from absent in divorce mediation practice, the majority of practicing family mediators are mental health professionals.²⁴

Second, Professor Nader argues that the unsupported rhetoric of the "litigation explosion" allow an inference that alternatives to litigation are unnecessary, and thus suspect as inhibiting vindication of rights. She indicates that talk of an overblown increase in litigiousness in America has been used to push for alternatives to trial.²⁵ Proponents of alternative dispute resolution argue that the great increase in legal filings has overburdened the courts, making alternative means of handling cases a necessity.²⁶ Professor Nader cites studies to support her argument that the so-called litigation explosion is a myth.²⁷ She argues that the absence of a dramatic increase in civil court filings supports her conspiracy theory.²⁸

Although Professor Marc Galanter, whom Professor Nader cites, questions the magnitude of the increase in court case filings, his work indicates that caseloads, particularly in federal courts, have increased in recent years.²⁹ He argues that the popular interpretation of this increase as reflective of community breakdown is insufficiently grounded in evidence.³⁰

Galanter does not focus on the number of criminal case filings, but he notes that the content of the state court caseload has shifted noticeably to criminal cases.³¹ Commentators have noted that the federalization of many

413, 418-21 (1985); JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 179 (1984); NEW YORK STATE LAW REVISION COMMISSION, *Recommendation of the Law Revision Commission to the 1985 Legislature Relating to the Child Custody Decision-Making Process*, 19 COLUM. J.L. & SOC. PROBS. 105, 122-28 (1985).

²³ FOLBERG & TAYLOR, *supra* note 22, at 7.

²⁴ ROGERS & McEWEN, *supra* note 14, § 11.2.

²⁵ Nader, *supra* note 1, at 6-7. The discussion of the court crisis has also been used to support other changes, such as speeding up the timetable for case disposition, limiting discovery, and curtailing access to the federal courts. See Lauren K. Robel, *The Politics of Crisis in the Federal Courts*, 7 OHIO ST. J. ON DISP. RESOL. 115, 124-25, 136 (1991) (discussing the reasons behind these proposed changes).

²⁶ Nader, *supra* note 1, at 6.

²⁷ *Id.* at 7.

²⁸ *Id.* at 6.

²⁹ Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 37-40 (1983); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 15 (1986).

³⁰ Galanter, *Reading the Landscape of Disputes*, *supra* note 29, at 69.

³¹ *Id.* at 42.

crimes, along with the war on drugs, has substantially increased the workload of federal trial courts.³² Some lawyers and judges share the perception that increased criminal caseloads, paired with inadequate funding, have led to unreasonable delays in the disposition of civil cases.³³ Galanter also notes that the number of federal court appeals has increased significantly in recent years, surpassing the increase in judicial resources.³⁴ The current burdens on the judiciary should make out-of-court resolution very attractive to courts, although for more innocuous reasons than Nader posits.

Finally, Professor Nader points to the limited voluntary use of mediation to support her argument that mediation is being forced down the throats of an unwilling populace.³⁵ Although this position has surface appeal, there are many other possible reasons for limited voluntary use.

Commentators note that inaccurate perceptions and inadequate knowledge about mediation may cause resistance to its use.³⁶ Research indicates that individuals' attitudes about mediation become more favorable as a result of reading informational literature.³⁷

Another argument advanced to explain resistance to mediation is that, by the time a dispute is aired publically, many people want retribution, vindication, or punishment of the other party to the conflict.³⁸ The desire for retribution can be related to how one party views the cause of the other party's offending behavior. If one party views the source of the dispute as a characteristic of the opponent, rather than an external factor, the offended

³² John Flynn Rooney, *Federal Judges Launch New Salvo on Crime Bill*, CHI. DAILY L. BULL., Mar. 14, 1994, at 1; *Is U.S. Justice System In a State of Crisis?*, NAT. L.J., Aug. 2, 1993, at 23; Steve Albert, *Ninth Circuit Rethinks Its Bid for Ten More Judges*, LEGAL TIMES, Aug. 16, 1993, at 11; Daniel Wise, *U.S. Judges are Wary of Fallout From Crime Bill: Concern That New Crimes Could Swamp the Courts*, N.Y. L.J., Dec. 7, 1993, at 1; Robel, *supra* note 25, at 124-25.

³³ *Is U.S. Justice System In a State of Crisis?*, *supra* note 32. But see Robel, *supra* note 25, at 118, 124-25 (noting that not all courts experience delay and that average case processing time is not exorbitant).

³⁴ Galanter, *Reading the Landscape of Disputes*, *supra* note 29, at 38.

³⁵ Nader, *supra* note 1, at 9.

³⁶ Ellen S. Cohn & Mae Lynn Neyhart, *Factors Affecting Public Acceptance of Mediation*, in COMMUNITY MEDIATION: A HANDBOOK FOR PRACTITIONERS AND RESEARCHERS 167, 170-71 (Karen G. Duffy et al. eds., 1991); David E. Matz, *Why Disputes Don't Go to Mediation*, MEDIATION Q., Fall 1987, at 3, 4.

³⁷ Cohn & Neyhart, *supra* note 36, at 170.

³⁸ Dean E. Peachey, *What People Want from Mediation*, in MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD PARTY INTERVENTION 300, 303 (Kenneth Kressel et al. eds., 1989); Matz, *supra* note 36, at 4.

party is more apt to seek revenge.³⁹ Because mediation relies on consensus, the prospect of a mediated settlement would rarely satisfy a participant desiring retribution.⁴⁰

Communication between participants during mediation can cause a party to change his or her perceptions about the cause of another's behavior and about the need for retribution. However, a party to a dispute may not be able to anticipate developing a different view of the situation before actually experiencing mediation. Merely reading informative literature concerning mediation is unlikely to change desire for retribution. The high satisfaction rates reported by mediation participants⁴¹ indicate that experience is the best teacher.

Disputants may also approach mediation with significant doubts about the possibilities of success. By the time the parties reach the courts or the mediation room, many have already tried and failed to resolve the disagreement themselves. Not surprisingly, people may feel that further discussion will be futile.⁴² Settlement rates in mediation show that participants' initial pessimism about the utility of the process is often unfounded.⁴³ Mediation often works when unassisted negotiations have failed. Again, experiencing success in mediation would be far more effective than abstract information about settlement rates in changing initially resistant attitudes.

Parties to a dispute often strongly believe in the propriety of their actions under their conception of justice. Members of the public may perceive the court's role as seeking and declaring truth,⁴⁴ and hence, justice. Mediation offers no similar result. If a party wants a ruling from an authority figure as to right and wrong, mediation is an unattractive option. Interestingly, legal professionals tend to describe the courts as avenues of

³⁹ Peachey, *supra* note 38, at 311-12. Cohn & Neyhart, *supra* note 36, at 177.

⁴⁰ Peachey, *supra* note 38, at 306.

⁴¹ Jeanne A. Clement & Andrew I. Schwebel, *A Research Agenda for Divorce Mediation: The Creation of Second Order Knowledge to Inform Legal Policy*, 9 OHIO ST. J. ON DISP. RESOL. 95, 98-99 (1993); Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 256-60 (1981); Janice A. Roehl & Royer F. Cook, *Mediation in Interpersonal Disputes: Effectiveness and Limitations*, in *MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD PARTY INTERVENTION* 31, 33 (Kenneth Kressel et al. eds., 1989); ROGERS & MCEWEN, *supra* note 14, § 3.3 n.44 (Supp. 1993).

⁴² Matz, *supra* note 36, at 4-5.

⁴³ Kenneth Kressel & Dean G. Pruitt, *Conclusion: A Research Perspective on the Mediation of Social Conflict*, in *MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD PARTY INTERVENTION* 394, 397 (Kenneth Kressel et al. eds., 1989).

⁴⁴ Cohn & Neyhart, *supra* note 36, at 171.

dispute resolution,⁴⁵ a vision identical to the prevailing view of the function of mediation.

Psychological factors may make mediation initially unappealing. Few people look forward to direct confrontation with others. Seeking resolution through an agent, or avoidance, is more comfortable than dealing with problems directly. In addition, disputants outside the court system may be embarrassed to admit that they need help to resolve their problems. An additional, very persuasive theory advanced to explain resistance to the use of mediation by disputants concerns the development of a "metadispute," or a dispute about the manner in which the underlying conflict was handled by the other parties.⁴⁶ For example, if one party presents a claim to another, and the other rejects the claim, the denial of relief can have an impact upon how the initiating party views both the responding disputant and the claim. The formation of another layer in the dispute increases the number of issues and the emotional involvement of the parties.⁴⁷ In turn, this increases the likelihood of party formation of erroneous attributions. It also intensifies the desire for retribution and vindication. These attitudes reduce the likelihood that disputants would initially seek out mediation, even though mediation can result in resolution of the problems.⁴⁸

Limited voluntary utilization does not necessarily support Professor Nader's assumption that people do not like what mediation offers. There are several other possible explanations for participant resistance to mediation. Settlement and satisfaction rates in mediation indicate that people who understand and experience mediation do find it valuable.

In sum, the shift away from litigation as the predominant method of resolving conflicts can be interpreted in more than one way. Professor Nader chooses to argue that the growing use of, and support for, alternative dispute resolution reflects a hierarchical conspiracy to suppress conflict. The alternative dispute resolution movement can also be interpreted to represent a rebalancing of social values towards a more cooperative orientation, away from the focus on individual rights characteristic of the 1960s.⁴⁹ Professor Nader does not discuss the implications or wisdom of this possible shift in values, yet this is an important issue. Perhaps, as Professor Sally Engle Merry notes, the organizational complexity of modern life and concomitant

⁴⁵ Simon H. Rifkind, *Are We Asking Too Much of Our Courts?*, in THE POUND CONFERENCE, *supra* note 19, at 51, 56. See also Cohn & Neyhart, *supra* note 36, at 171-72.

⁴⁶ Craig A. McEwen & Thomas W. Milburn, *Explaining a Paradox of Mediation*, 9 NEGOTIATION J. 23, 26 (1993).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Sally Engle Merry, *Anthropology and the Study of Alternative Dispute Resolution*, 34 J. LEGAL EDUC. 277, 282 (1984).

need for societal stability may be endangered by confrontation.⁵⁰ Mediation may also be an attractive option for resolving disputes without a determination of which participant's value system will prevail. This might be a benefit in our increasingly multicultural society.⁵¹

B. Does Mediation Suppress Conflict?

Professor Nader fears that mediation practices are inherently coercive, especially to historically powerless and disenfranchised groups, such as women and people of color.⁵² A brief overview of mediation theory and practice precedes discussion of these concerns.

1. The Process and Purpose of Mediation

There are many ways to settle a dispute. Parties can ignore or avoid a problem, talk informally among themselves, or hire agents to negotiate a resolution. If negotiation does not work, disputants can call in a mediator to help structure the discussions. If no consensual settlement can be reached, parties may submit the matter to arbitration, or take the case to trial, allowing a third party to decide the matter.

Mediation is basically a negotiation between disputants facilitated by a disinterested third party with no authority to issue a decision.⁵³ Mediation sessions are private, and most mediators attempt to protect the confidentiality of the communications.⁵⁴ Although no two mediators can be expected to agree completely on a standard definition of mediation, most would concur that certain essential elements distinguish the process. First, all the parties to the dispute must be given the opportunity to express their points of view fully. Next, the issues separating the parties must be defined. Negotiations then begin in order to see if the competing interests of the parties can be accommodated in a mutually agreeable manner.⁵⁵

Successful mediations often deal not only with the issues initially stated by the parties, but also with the underlying issues or root causes of the

⁵⁰ Merry, *supra* note 49, at 283.

⁵¹ *Id.* at 282.

⁵² Nader, *supra* note 1, at 4.

⁵³ See ROGERS & MCEWEN, *supra* note 14, § 3.3, at 20-21 and NANCY H. ROGERS & RICHARD A. SALEM, A STUDENT'S GUIDE TO MEDIATION AND THE LAW, 7-39 (1987), for a general overview of the mediation process and further citations.

⁵⁴ See ROGERS & MCEWEN, *supra* note 14, §§ 8.1 and 8.2, for a brief overview of confidentiality.

⁵⁵ ROGERS & MCEWEN, *supra* note 14, § 3.3; ROGERS & SALEM, *supra* note 53, at 7-39.

conflict.⁵⁶ Many mediators attempt to avoid positional bargaining, in which disputants insist on attaining a certain result before carefully thinking about their own needs or fully listening to the concerns of the other parties.⁵⁷ Instead, mediators often try to focus the parties' attention on meeting their underlying interests or needs, and searching for mutual gain wherever possible.⁵⁸ Mediation attempts to alter the parties' initial perceptions of what they wish to gain from the dispute. No change in the positions of the parties can be attained, and no settlement reached, if the parties fail to shift their perception of the strength of their case, or fail to appreciate the merits of their opponent's arguments.⁵⁹

Mediation can be strictly voluntary, or can be accompanied by pressures or mandates.⁶⁰ Mandatory mediation generally means that the parties must at least meet for a mediation. Some jurisdictions also require some form of payment.⁶¹

Mandates to use mediation can be accompanied by pressures to settle, such as delay in a party's ability to file suit, financial disincentives of going to trial, and public disclosure or mediator reports to the court.⁶² Settlement pressure reflects the justice system's goal of reducing the number of cases going to trial.⁶³ The system's goal is inconsistent with the parties' interest in unfettered access to the courts, absent truly voluntary settlement.⁶⁴

Pressures to settle have been poorly received by professional groups and policy makers.⁶⁵ However, pressures will probably remain attractive to the courts.

2. Public Policy and the Mediator's Power

To show the alleged dangers of mediation, Nader draws heavily from

⁵⁶ FOLBERG & TAYLOR, *supra* note 22, at 8; ROGERS & SALEM, *supra* note 53, at 9-10.

⁵⁷ ROGERS & SALEM, *supra* note 53, at 27.

⁵⁸ CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS* 38-39 (1986).

⁵⁹ ROGERS & SALEM, *supra* note 53, at 10, 11.

⁶⁰ *Id.* at 17-18.

⁶¹ ROGERS & MCEWEN, *supra* note 14, § 5.3.

⁶² *Id.* § 7.1.

⁶³ *Id.*

⁶⁴ *Id.* § 7.5.

⁶⁵ CENTER FOR DISPUTE SETTLEMENT, *THE INSTITUTE OF JUDICIAL ADMIN., NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS, EXECUTIVE SUMMARY* (1992) §§ 5.1(b), at 6, and 11.3, at 9; SOCIETY FOR PROFESSIONALS IN DISPUTE RESOLUTION, *REPORT NO. 1 OF THE LAW AND PUBLIC POLICY COMMITTEE, MANDATED PARTICIPATION AND SETTLEMENT COERCION: DISPUTE RESOLUTION AS IT RELATES TO THE COURTS* 16 (1991).

an article by Trina Grillo discussing the use (or, more accurately, misuse) of mandatory mediation in some California divorce courts.⁶⁶ Both authors believe that the promised benefit of mediation has not been realized.⁶⁷

Two aspects of mediation must be examined when inquiring into the potentially coercive effects of the process. First, broad policy issues affect choices of program design. Second, an individual mediator's behavior has an effect upon the actions of the parties. The two issues are interrelated, since policy decisions can affect mediator actions.

The California mediation statute mandates participation in mediation when parents cannot agree about child custody.⁶⁸ The courts provide the mediator,⁶⁹ and sessions are private and confidential.⁷⁰ The mediator can exclude the parties' attorneys from the sessions.⁷¹ If the participants do not reach an agreement, the mediator may make a recommendation to the judge concerning custody or visitation of the children.⁷²

Several aspects of the California custody mediation program present serious problems. First, taken in context, California's confidentiality provisions are problematic. Confidentiality is meant to foster free discussion. It also results in nondisclosure of information about what occurs in mediation sessions. To counterbalance the unavailability of information exchanged during mediation, mediators are generally not granted power to decide the outcome of a conflict.⁷³ This arrangement protects both the parties' interests in access to the courts and the public's interest in access to information about the judicial decision-making process.

California's custody mediation scheme fails to properly balance the competing interest of privacy in mediation with the interests of the parties and the public. Permitting the mediator to give an opinion to the judge gives the mediator too much power over a party he or she dislikes or perceives as uncooperative. The role of the mediator is to structure settlement discussions, not decide the case. Not all mediators disagree with California's approach. Commentators have indicated that a mediator's ability to make reports to the court when the parties do not settle may

⁶⁶ Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991).

⁶⁷ *Id.* at 1551; Nader, *supra* note 1, at 11.

⁶⁸ CAL. CIV. CODE § 4607(a) (West 1983).

⁶⁹ *Id.* § 4607(b).

⁷⁰ *Id.* § 4607(c).

⁷¹ *Id.* § 4607(a).

⁷² *Id.* § 4607(e).

⁷³ In an exception to this general rule, in what is known as "med-arb," the parties first try to resolve the dispute with the assistance of a traditional mediator. If negotiations fail, the mediator can make a decision as an arbitrator. See ROGERS & McEWEN, *supra* note 14, § 7.1.

actually motivate parties to work more productively in mediation.⁷⁴ These advocates of reporting do not address the implications of what may be contained in the mediator's report. Reports concerning behavior which frustrates productive negotiation can theoretically be distinguished from reports recommending an outcome. However, reports based upon participant behavior pose a risk of decisionmaking based upon emotion rather than law and evidence.

Mediators are not well-equipped to make informed decisions. They do not conduct thorough investigations into the family situation. They cannot perform in-depth psychological assessments of the parents and children to determine parental competence and children's adjustment. This job is best left to mental health professionals who have the time and resources to conduct comprehensive evaluations.

If the judge is likely to accept the mediator's opinion, a mediator can effectively coerce a reluctant party into agreeing to his or her custody recommendation. Contesting the mediator's recommendation can be time-consuming and expensive, and the risk of loss may be high. Under these circumstances, a parent may simply give up the fight.⁷⁵

Granting the mediator power to exclude attorneys from mediation sessions is also unwise. The risk of an essentially involuntary "agreement" is exacerbated if the mediator forbids attorney involvement. Attorneys are required to protect their clients' interests,⁷⁶ but this job is frustrated when lawyers are denied access to settlement discussions.⁷⁷

The California mandatory custody mediation system places the courts' interest in docket control ahead of the parties' interest in free choice of settlement or trial.⁷⁸ Wisely, the California system has not been widely

⁷⁴ Kenneth Kressel et al., *Research in Contested Custody Mediations: An Illustration of the Case Study Method*, *MEDIATION Q.*, Summer 1989, at 55, 67 (citing Neil B. McGillicuddy et al., *Third Party Intervention: A Field Experiment Comparing Three Different Models*, 53 *J. PERSONALITY & SOC. PSYCHOL.* 104, 104 (1987)).

⁷⁵ In *McLaughlin v. Superior Court*, 189 Cal. Rptr. 479, 481 (1983), the court held that a mediator making a custody recommendation to the court is subject to cross-examination.

⁷⁶ MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7, EC-7-1, 7-4 (1981) (a lawyer should represent a client zealously within the bounds of the law).

⁷⁷ This exclusionary policy may be in response to criticism of lawyers as frustrating progress in mediation by taking an adversarial stance. In my experience as a mediator in small claims and municipal court in Franklin County, Ohio, although attorneys can be obstructive in some cases, attorneys can also be helpful to the process. There is not enough evidence that the presence of lawyers is obstructive to support a policy of blanket exclusion.

⁷⁸ In San Francisco, mandatory mediation significantly dropped the number of full contested visitation and custody trials from an average of 275 a year to 3 a year from 1977 to 1980. Michelle Deis, Note, *California's Answer: Mandatory Mediation of Custody and*

copied.⁷⁹ Most mediation programs have been structured to protect the parties' choice of whether to settle. Criticism of all mediation programs and processes as coercive, based upon one poorly structured example, is overbroad.

Turning from public policy to the practice of mediation, Professors Nader and Grillo focus heavily on aspects of mediator behavior which they feel can result in unfair settlements. Both criticize mediation for ignoring both the fault and the context of the dispute of women's anger, and for treating men and women as equal when, in fact, women are less powerful than their husbands.⁸⁰ While mediation is not perfect, these criticisms are themselves subject to critical analysis.⁸¹

Professor Grillo's article is based upon mediation sessions she has either observed or had reported to her.⁸² No statistical information is presented. Although observation and reflection are excellent ways to detect problems, it is impossible to tell how common identified mediator behavior is without more information.

Professors Nader and Grillo assert that the California child custody mediators pay insufficient attention to the background of the parents' conflict over the children.⁸³ Mediators do need to understand the facts giving rise to a dispute. However, the mediator's role differs from the roles assumed by advocates and negotiators. The mediator's goal is to help people resolve a problem. The goal of the advocate or negotiator is to persuade a decision-maker or opponent of the merits of their case in order to obtain a favorable outcome. These different roles require mediators to use facts in a different way.

Mediators use the factual statements of the parties in order to accomplish two major purposes. One purpose is to develop understanding between the parties about the way past events have made each party feel. This creates empathy in place of blame and anger. Neither party must abandon their own perspective, but understanding each other's point of view creates momentum towards settlement. This momentum is furthered by the

Visitation Disputes, 1 OHIO ST. J. ON DISP. RESOL. 149, 158, 160 (1985).

⁷⁹ See ROGERS & McEWEN, *supra* note 14, § 7.1 (citing *Family Disputes: Hawaii, Florida, and California Courts Maintain Statewide Family Mediation*, 3 Alternative Disp. Resol. Rep. (BNA) 335, 337 (Sept. 28, 1989)) (33 California counties permit mediator recommendations and 21 counties do not).

⁸⁰ Grillo, *supra* note 66, at 1567, 1569-72, 1574-77; Nader, *supra* note 1, at 11, 13.

⁸¹ See Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467 (1991), for a detailed analysis of Professor Grillo's article, reaching conclusions similar to the ones presented here.

⁸² Grillo, *supra* note 66, at 1551 n.13.

⁸³ *Id.* at 1564; Nader, *supra* note 1, at 11.

rapport generated by the mediator's empathetic comprehension of each party's perspectives. Mediators also use information about the context of the dispute to shape a resolution that helps to avoid repetition of past problems. No one can change history, but a mediator, informed by an understanding of the past, can help improve future interactions.

Any good litigator or negotiator understands that mastering the facts of a case is crucial to good job performance. In contrast, a mediator does not have to be in total command of the facts in order to be competent at facilitating settlement. The feelings generated by the facts are more useful to the mediator than total comprehension of the facts in searching for resolution. In addition, many of the factors influencing parties to settle are independent of the facts. Factors influencing a decision to settle may include the cost of continued litigation, a party's assessment of the likelihood of success at trial, risk avoidance, and a desire to get on with one's life.

Nader and Grillo also criticize mediation for failing to allocate fault.⁸⁴ This criticism challenges the basic premise of neutrality as a critical component of mediation. Although neutrality is often espoused without clear definition or critical examination, the term usually means that a mediator will not decide who wins a case, and will not align himself or herself with one disputant.⁸⁵

Without overt institutional pressures to settle, a mediator generally cannot determine the outcome of a conflict. However, mediators often have a good deal of influence over the parties. Mediators may have strong feelings about the relative merits of disputes, including feelings about who may be at fault. A mediator can effectively legitimize one party's position at the expense of an other's, or can legitimize all parties' perceptions for different reasons. The mediator's actions necessarily have an impact on the outcome of the case.

As often occurs in mediation, the mediator must make judgment calls about whether his or her own reactions to a disputant are based on unsupportable bias, such as race, class, or personality, or on generally accepted societal values. While a mediator should take care to avoid prejudice, no mediator is ever value-free. The difficult issue is how to discuss fault in a way that facilitates, rather than derails, resolution.

In most cases, a mediator gains little and risks much by casting blame. The mediator may mistakenly allocate fault, thereby preventing a party's acceptance of the process. A mediator seldom has the tools necessary to determine who is telling the truth in a factual dispute. Mediators normally work only with the parties and their attorneys. They may review documents,

⁸⁴ Grillo, *supra* note 66, at 1567; Nader, *supra* note 1, at 13.

⁸⁵ Janet Rifkin et al., *Toward a New Discourse for Mediation: A Critique of Neutrality*, 9 MEDIATION Q. 151, 152 (1991).

but they rarely speak with witnesses. Not surprisingly, this lack of detailed evidence means that a mediator's reactions to a party may be wrong or incomplete. Assessing blame is dangerous under these conditions.

A mediator's expression of opinion about fault also risks derailing resolution by angering the blamed party. Allocation of fault by the mediator is unnecessary if the blamed parties agree they were at fault. Therefore, there is no need to assess blame unless the participants deny fault, at least to some degree. A judge runs no risk in allocating fault, since judicial decision is imposed by fiat, not attained by mutual agreement. However, a mediated settlement hinges upon consensus, which is unlikely to emerge if a party is angered by the mediator's alignment with another participant.⁸⁶

A mediator can be most effective by ensuring that each party understands the other party's arguments about fault. When the parties understand each other's feelings, they can assess the merit of the arguments and decide whether to modify their own positions in response. If one party's position is unsupportable, the mediator can indicate that he or she sees the other party's point, which is a more gentle and less dangerous way of communicating a judgment as to fault based on societal values.

Nader and Grillo also criticize mediation for failing to allow the expression of women's anger.⁸⁷ They state that mediators repress discussion of feelings, whereas trial facilitates the release of anger.⁸⁸ Both postulate that suppressing anger is dangerous to women's mental health, and that expressing anger through surrogates at trial is cathartic.⁸⁹ Assuming that venting anger is psychologically beneficial, the available research does not support the assertion that mediation, compared to trial, is more likely to repress expression of anger. The studies indicate that, in general, the reverse is true. A study of small claims mediation shows that participant anger was more likely to increase during trial than in mediation, and that greater numbers of mediation participants felt less upset at the conclusion of mediation, compared to the group in adjudication.⁹⁰ A study of divorce mediation and adjudication also found that anger levels increased during

⁸⁶ In a divorce case, it seems odd to criticize mediators for failing to allocate fault when the divorce laws have moved away from the concept of fault. The trend in America is clearly towards no-fault divorce. Not only does fault no longer have to be shown to get a divorce, but fault is now less commonly a factor in the provision of alimony and division of property than in the past. J. Thomas Oldham, *Putting Asunder in the 1990s*, 80 CAL. L. REV. 1091, 1095 (1992) (book review).

⁸⁷ Grillo, *supra* note 66, at 1576-79; Nader, *supra* note 1, at 13, 14.

⁸⁸ Grillo, *supra* note 66, at 1572-76; Nader, *supra* note 1, at 11-12.

⁸⁹ Grillo, *supra* note 66, at 1573; Nader, *supra* note 1, at 13, 14.

⁹⁰ MCEWEN & MAIMAN, *supra* note 40, at 256.

trial.⁹¹ If women can express anger at trial, but not in mediation, and if the expression of anger is therapeutic and leads to healing, levels of anger should usually end up lower after trial than at the close of mediation. This is not the case.

Actually, psychological research questions the common assumption that expression of anger is beneficial. The effect of venting anger depends upon the situation and especially upon the reaction of the person receiving the message.⁹² Angry expressions are effective when they cause the offending person to change and "clean up his act," restoring the speaker's sense of control.⁹³ To be truly cathartic anger must be expressed to the cause of the rage, be appropriate to the magnitude of the injury, and not draw retaliation.⁹⁴ Such expressions can help the speaker feel vindicated and accomplish a social goal.⁹⁵

However, when these conditions are not met, merely ventilating anger to others does not exorcise it. On the contrary, talking about the anger-inspiring situations reinforces the feelings.⁹⁶ Subsequent recitals can cause the emotions to reappear with each retelling,⁹⁷ and create greater hostility to the object of the anger than arises in people who are not permitted to express their hostility.⁹⁸

The lessons of mediation practice further indicate that the expression of anger can carry both benefits and risks. On the positive side, venting feelings in mediation may be therapeutic. Speaking directly to the party blamed for the problem is one factor required for catharsis, and may help a participant overcome emotional blocks to the resolution of the dispute. Further, expression of feelings may allow the listening parties to recognize the effect of their actions on others. This realization can soften a party's prior position by developing mutual understanding.

Expression of intense feelings can also frustrate attempts to reach a consensual resolution. When one party continuously expresses anger toward another, and gets no results, the anger is reawakened and reinforced. Also, the parties against whom the anger is directed can become angry and retaliate, especially when they feel that the other's complaints are baseless. Unless expression of anger results in change or some understanding between

⁹¹ Joan B. Kelly, *Parent Interaction After Divorce: Comparison of Mediated and Adversarial Divorce Processes*, 9 BEHAV. SCI. & L. 387, 394 (1991).

⁹² CAROL TAVRIS, *ANGER: THE MISUNDERSTOOD EMOTION* 145 (1982).

⁹³ *Id.* at 146, 149.

⁹⁴ *Id.* at 129-30, 247.

⁹⁵ *Id.* at 144.

⁹⁶ *Id.* at 132.

⁹⁷ TARRIS, *supra* note 92, at 133.

⁹⁸ *Id.* at 133.

the parties, with a concomitant reduction in the level of anger, it will derail problem-solving. Therefore, mediators sometimes need to exercise control over expression of emotion within sessions to avoid escalation of the conflict. As often occurs in mediation, the mediator must struggle with the issue of how best to balance the sometimes competing needs for emotional expression and rational discussion.

Change is the key to conflict resolution.⁹⁹ It is also the key to the productive expression of anger. In voluntary dispute settlement, the change must come from within the parties. Mediators try to influence the participants to change. They possess skills to help correct mistaken perceptions, ensure all parties are heard, and focus on generating solutions. Mediation has the potential, although not always realized, to transform anger into resolution.

In trial, change is externally imposed. If parties to a conflict do not change perspectives themselves, they either remain in conflict or submit the dispute to the courts for decision. Trial emphasizes one party arguing against another, as opposed to each side listening and trying to understand the other. The judicial decision may vindicate one party at the expense of the other. While the winner will likely feel better, the loser may continue to harbor anger. Trial provides a public forum for the quest for justice, but it lacks the transformative potential of mediation. However, adjudication serves an important purpose when parties cannot or do not wish to settle the conflict themselves.

3. Power Imbalances In Mediation

Professor Grillo's criticisms concerning the potentially oppressive effect of the mediation process on women are derived from a system in which over half of the courts permit the mediator to have a great deal of power over the resolution.¹⁰⁰ The way mediation is practiced is influenced by the context in which it occurs. For example, day-of-trial mediation in small claims court may share some similarities with multiple-session divorce mediation or mediation involving large, complex business disputes. The different situations may also produce significant differences in the way mediators and parties behave. It is difficult to generalize accurately about the subtle dynamics of interaction among diverse settings. Criticisms of all mediation programs based on the California system may be inaccurate. The dynamics of the mediation process should differ greatly where mediators have no ability to recommend the outcome of the case to the court.

⁹⁹ GERALD WILLIAMS, OHIO CLE INSTITUTE, *NEGOTIATION AND SETTLEMENT IN THE 90S: NEW DIMENSIONS FOR LAWYERS* 86 (4th ed. 1992).

¹⁰⁰ Grillo, *supra* note 66, at 1555.

In spite of these risks, Professor Nader expands Professor Grillo's concerns about mandatory custody mediation in California to cover all cases in which she discerns an imbalance of power between the participants. She seems to believe that all mediation, not just mandatory mediation, is dangerous, except among equals.¹⁰¹ Other critics of mediation question the fairness of the process for minorities, women, and the poor.¹⁰² These commentators use adjudication as the benchmark for comparisons of fairness.¹⁰³

There is no question that American society is filled with diversity. People of many different ethnic and cultural backgrounds co-exist, often uneasily. Women and members of racial and ethnic minorities have often been denied opportunities available to majority men. In addition, women and members of other culturally different groups may think and feel differently than white men. Gender and cultural differences may create disadvantages for minorities and women in mediation. Women and minorities also tend to have fewer financial resources than many majority men. Economic disparities among people of the same cultural background and gender might also cause power imbalances.

Two major issues arise in any discussion of ethnic and gender differences in mediation. First, one must examine the extent to which beliefs about differences are based upon accurate generalizations or upon unsupported stereotypes. Second, one must look at the extent to which even accurate generalizations about group differences cause unfairness to group members. In theory, differences could cause the mediation process to be unfair, could create unfair results, or both.

The fairness of mediation cannot be examined in a vacuum. Both the processes and outcomes of mediation should be examined in relation to the fairness of the other available dispute resolution processes. Most commentators compare the fairness of mediation to the fairness of trial.¹⁰⁴ This dualism ignores the fact that the vast majority of disputes entering the legal system are settled through negotiation. Accordingly, the advantages and disadvantages of mediation should be compared to the pros and cons of both negotiation and litigation.

Concerns about the equity of mediation for traditionally disadvantaged groups arise from three different, but often interrelated, sources. First, the effects of the gender and cultural differences themselves may increase the risks of unfairness in mediation. For example, women have been described

¹⁰¹ Nader, *supra* note 1, at 5.

¹⁰² Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 5 WIS. L. REV. 1359, 1367-91 (1985).

¹⁰³ *Id.* at 1367-75.

¹⁰⁴ Delgado et al., *supra* note 102, at 1367-75.

as being more relationship oriented than men, while men are more competitive.¹⁰⁵ In a conflict, this difference might influence women to accommodate the wishes of other participants and thus achieve less desirable outcomes for themselves. A person from a culture which emphasizes polite behavior may be more reticent than an American in voicing criticism in mediation, leaving issues to simmer.¹⁰⁶

Second, deeply ingrained societal prejudice against minorities and women can make informal dispute resolution unfair to these groups. Theories suggesting a potential for unequal outcomes for both women and minorities in mediation include the possibilities that mediators are biased, that bias flourishes in informal settings, that the mediator helps or acquiesces in the exercise of domination by members of majority groups, and that minorities and women believe they will be disadvantaged in any forum, so they accept unfair results as part of a self-fulfilling prophecy.¹⁰⁷

Power imbalances are a third source of concern for critics of mediation. Informal dispute resolution has been criticized for denying access to justice, operating to the disadvantage of less powerful parties, and removing energy from efforts at systemic reform.¹⁰⁸

What do we really know about cultural and gender differences and power imbalances? Within the dispute resolution field, a number of articles have been written about differences in negotiating behavior among different nationalities.¹⁰⁹ However, review of the literature on cultural differences between sub-groups in America shows the relative paucity of knowledge, as opposed to theory, in this area.¹¹⁰

Many difficulties arise in attempts to determine accurately characteristics of different cultural minorities in America. Acculturation is one major variable. Groups differ in rates of integration, depending on factors such as length of time in the country, pre-existing cultural traits,

¹⁰⁵ See generally CAROL GILLIGAN, *IN A DIFFERENT VOICE* 24-63 (1982). If a woman does have a more relational sense of self than her male opponent, and this sense of self results in her giving up more than a man in mediation or negotiation than in litigation, we need to think of the implications of telling this woman to change her value system. Requiring the woman to go to trial rather than settle seems to reinforce patriarchy.

¹⁰⁶ Cf. MICHELLE LEBARON DURYEA, *UVIC INSTITUTE FOR DISPUTE RESOLUTION, CONFLICT AND CULTURE: A LITERATURE REVIEW AND BIBLIOGRAPHY* 44-45 (1992).

¹⁰⁷ Delgado et al., *supra* note 102, at 1375-85; MICHELE HERMANN ET AL., *THE METRO COURT PROJECT FINAL REPORT*, Jan. 1993, xxvi-xxix, 3.

¹⁰⁸ Delgado et al., *supra* note 102, at 1391-1402.

¹⁰⁹ See, e.g., Thomas Flannigan, *Negotiating With the Japanese*, CBA REC. June 1989 at 6, 26; Danian Zhang & Kenji Kuroda, *Beware of Japanese Negotiation Style: How to Negotiate With Japanese Companies*, 10 NW. J. INT'L L. & BUS. 2, 195-212 (19xx).

¹¹⁰ See generally DURYEA, *supra* note 106.

language facility, employment opportunities, economic status, group cohesion, family structure, and community makeup. Members of groups with similar backgrounds may be dissimilar in certain respects. For example, although Hispanics are generally grouped together as an ethnic group, some Spanish-surnamed Americans came from Cuba, others from Portugal, Spain, Puerto Rico or South America, and others from Mexico. Geographic distribution may influence groups in different ways. Hispanics living in the Southwest might find both similarities and differences with others located in Florida, the Midwest, or the East Coast. To date, studies attempting to accurately identify shared cultural traits of American subgroups are noticeably lacking.¹¹¹

In the absence of data, but with an awareness of the need for mediators to be alert issues relating to cultural diversity, some commentators have attempted to sketch out culturally related characteristics that may surface in mediation. For example, writers have suggested that Asian participants tend to "ask [the] mediator for advice as a higher authority."¹¹² This tendency is not ascribed to Iranians.¹¹³ Experience shows that these suggestions must be taken with a grain of salt. The Mediation program at The Ohio State University¹¹⁴ handled two disputes involving recent immigrants from the Middle East¹¹⁵ and one case involving two Chinese disputants. In both cases, the Middle Eastern participants asked the mediator what they should do. In the case involving the Asian parties, neither asked the mediator for advice — and neither party showed any willingness to compromise, in spite of the traditional use of mediation in Chinese society.¹¹⁶

Theories of differences based on gender also lack empirical support. This is not to say that posited distinctions between the sexes do not exist. The problem is that we simply do not know much about the accuracy or pervasiveness of perceived gender differences. In addition, characteristics that may generally be more strongly emphasized in women are not totally

¹¹¹ DURYEA, *supra* note 106, at 31; Susan B. Goldstein, *Cultural Issues in Mediation: A Literature Review* 1, 2 (1986), PCR Working Paper.

¹¹² FOLBERG & TAYLOR, *supra* note 22, at 323.

¹¹³ *Id.*

¹¹⁴ These cases were mediated by students from the Ohio State University College of Law Mediation Seminar and Practicum. Cases were referred from the Franklin County, Ohio, Municipal Court System through the pre-filing mediation program and day-of-trial court referrals.

¹¹⁵ We did not check for exact nationality.

¹¹⁶ FOLBERG & TAYLOR, *supra* note 22, at 1-2; Joan Kelly, *Mediation in China: A Fresh Look*, *MEDIATION NEWS* (Academy of Family Mediators), Spring, 1994, at 6; Merry, *supra* note 49, at 279.

lacking in men.¹¹⁷ People are capable of a vast range of behavior.

Individuals differ markedly within all groups. In any given situation, it is difficult to distinguish accurately between behavior that may be caused by cultural characteristics and behavior that results from individual idiosyncracies. Without further research, assumptions of group-based distinctions risk over-reliance on stereotypes.

An example drawn from an actual case illustrates the dangers of over-reliance upon theories of difference. A few years ago, a mediation student was reading Carol Gilligan's book, *In a Different Voice*. We were engaged in a lively discussion of the book until the cases were called. That day, we mediated a dispute between two young African-American college men. In the discussion, one party focused on right and wrong, relied on the rule of law to support his position, ignored feelings arising out of the past relationship, and dismissed attempts to discuss the large context of the dispute — a stereotypically "masculine" approach.¹¹⁸ The other participant focused on the past relationship between the two, looked at the whole picture of the dispute, including aspects totally lacking in legal relevance, did not feel right and wrong were easily defined, and was far more concerned about his feelings and gaining his opponent's approval than the other man — a stereotypically "feminine" approach.¹¹⁹ The case caused both of us to examine claims of group-based cultural differences with a more critical eye. Later, it occurred to me that each party had made the argument that was most persuasive for his side, given the facts and the law of the case. Perhaps each man chose the negotiating approach most beneficial to his interest in the dispute. The behavior we observed may have been due less to natural inclination than to strategic choice.

Mediators have begun to show concern about the influence of cultural and gender issues in mediation. To date, most attempts to foster fairness to members of all groups in mediation have focused on creating mediator awareness of differences and eliminating mediator bias through sensitivity training.¹²⁰ Attempts to reduce mediator prejudice and to foster mediator awareness of behavioral differences which may be culturally determined are certainly steps in the right direction. Unfortunately, this approach has flaws. First, it is difficult to evaluate the effectiveness of attempts to reduce mediator prejudice. Second, the lack of solid knowledge about defining differences limits the utility of this approach to reducing bias and attaining

¹¹⁷ See generally GILLIGAN, *supra* note 105.

¹¹⁸ *Id.* at 24-63.

¹¹⁹ *Id.*

¹²⁰ DURYEA, *supra* note 106, at 53; John Paul Lederach, *Training on Culture: Four Approaches*, CONCILIATION Q., Winter, 1990, at 6, 11-13.

fairness.¹²¹ It is practically impossible to suggest ways to approach cultural differences when we do not have a good understanding of what the differences are, or how those differences are manifested in behavior. Third, sensitivity training certainly does nothing to discern and eliminate disadvantages to participants that may arise from the structure of the mediation process itself.

Researchers have begun to examine issues of fairness in mediation. To date, the little data that is available focuses on mediated outcomes in comparison to litigated outcomes in similar cases. Comparisons of mediated and negotiated resolutions are lacking. Further, the few outcome studies that have been conducted have not examined the mediation processes for evidence of systemic bias.

Outcome studies to date have generally failed to support the theory that women fare poorly in mediation.¹²² In divorce cases, where women are theoretically unequal to their more powerful husbands, results in mediation are similar to results attained in litigation and negotiated settlements. The law and legal norms seem to shape settlements, regardless of forum.¹²³ Mediated agreements may be more beneficial to children's interests (and thus indirectly beneficial to women's interests), than negotiated settlements, because mediation is more likely to result in detailed visitation arrangements, payment of child support beyond age eighteen, and payment of college expenses.¹²⁴

A recent study of mediated outcomes compared to adjudicated results in New Mexico small claims courts found that women respondents actually fared better in mediation than in adjudication.¹²⁵ With this exception, gender of the participant in mediation or adjudication made no difference.¹²⁶

Little work has been done to test the theory that minorities will be disadvantaged in mediation.¹²⁷ The New Mexico small claims court study discussed above was able to examine the effect of ethnicity on mediation

¹²¹ DURYEA, *supra* note 106, at 53; John Paul Lederach, *Training on Culture: A Survey of the Field*, CONCILIATION Q., Winter, 1990, at 4-5.

¹²² Nader, *supra* note 1, at 13.

¹²³ JESSICA PEARSON, STATE JUSTICE INSTITUTE FAMILY MEDIATION (A Working Paper for the National Symposium on Court Connected Dispute Resolution Research) 17-20 (Oct. 15-16, 1993). See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968-69 (1979) for a discussion of bargaining theory as informed by legal rules.

¹²⁴ PEARSON, *supra* note 123, at 19-20.

¹²⁵ Hermann et al., *supra* note 107, at xxii.

¹²⁶ *Id.*

¹²⁷ Clement & Schwebel, *supra* note 41, at 106.

results.¹²⁸ Hispanics made up the vast majority of minorities in the study area.¹²⁹ This study found that Hispanic disputants did not fare as well in mediation as adjudication, but that this difference disappeared when the co-mediators were both Hispanic.¹³⁰ The adjudicative forum ameliorated, but did not completely erase, the effect of ethnicity upon the less favorable outcomes generally obtained by Hispanics.¹³¹

The results of this study have important implications for mediation. A crucial question is why the outcomes differed. The authors of the study do not claim to answer this question, but note that mediation has been used in Hispanic culture for generations. Traditional mediators give opinions concerning right and wrong.¹³² In the court-connected program, mediators were trained to be neutral and withhold personal opinions. This might undermine the Hispanic participants' sense of the merits of their case.¹³³ Other possible explanations for the less favorable results experienced by Hispanics include: bias on the part of the mediator, risk of the informal forum to traditionally disadvantaged groups, mediator perpetuation of pre-existing power imbalances, and lower expectations on the part of minorities.¹³⁴

None of these hypotheses can be conclusively disproved from the data obtained in the study. However, the hypothesis related to the use of traditional mediation in Hispanic culture is intriguing. Women are also viewed as disempowered and subject to discrimination in this culture. If the disparate results were caused by mediator bias, the perpetuation of underlying power imbalances, and self-fulfilling prophecies, it would seem that women would also fare worse in mediation. As discussed above, this has not been shown to be the case in the studies conducted to date.

If the study results can accurately be attributed to the culturally based

¹²⁸ Hermann et al., *supra* note 107, at xix-xx.

¹²⁹ *Id.* at xv.

¹³⁰ *Id.* at xx-xxi. See Goldstein, *supra* note 111, at 33, 34 and DURYEA, *supra* note 106, at 51, 52, for a review of the counseling literature concerning cultural matching of clients and counselors. Both note that some evidence favors cultural matching, but that other studies indicate that factors other than cultural similarity may be more important. One Australian study did not find a relationship between cultural matching and settlement rates in mediation, but did not examine relative equality of the outcomes of similar cases. LINDA FISHER & JEREMY LONG, CULTURAL DIFFERENCES AND CONFLICT IN THE AUSTRALIAN COMMUNITY (The Centre for Multicultural Studies Working Papers on Multiculturalism No. 11, 1991).

¹³¹ Hermann et al., *supra* note 107, at xix.

¹³² *Id.* at xxvii.

¹³³ *Id.* at xxvi-xxvii.

¹³⁴ *Id.* at xxvi-xxix.

different expectations of Hispanics concerning mediator neutrality, it is likely that mediators can be taught specific skills to apply in disputes involving Hispanics in order to increase fairness. If further research shows that process characteristics cause the less favorable outcomes, modifications of the way mediation is conducted may help. If bias and prejudice are the culprits, an effective remedy will be difficult to fashion; the use of mediation in cases involving minorities will have to be re-evaluated. Disputants should not be required or encouraged to participate in a conflict resolution process that exacerbates unfairness.

The researchers warn that the results for Hispanics cannot be assumed to occur in cases involving other minorities.¹³⁵ Clearly, more research needs to be done. In particular, it would be helpful to examine whether or not mediation results in unfavorable outcomes for African-Americans, a large minority group.

Persons of low socio-economic status are also hypothesized to be disadvantaged in the mediation forum.¹³⁶ Critics of informal dispute resolution propose that mediation be reserved only for cases between equals.¹³⁷ If this policy is adopted, many cases would be rejected on their face, due to commonly held perceptions of relative powerlessness.

Reserving mediation for cases between equals is not as easy to do as it first seems. It is hard to imagine a situation in which the participants are truly equal. When parties appear to be equal on the surface, many factors can be used to show actual inequalities. Perhaps one businessman has more negotiating experience than his opponent, or perhaps one white male disputant earns more than another. With only a little imagination, the list could be endless. The number of cases found to be appropriate for mediation would be small. Accepting some power imbalances, such as those operating between two white males, while rejecting others, seems hypocritical.

Powerlessness is far too complex a phenomenon to be accurately ascribed to a particular individual in mediation on the basis of group membership. Individuals differ tremendously within groups. Further, to the extent that power imbalances between disputants exist, it is reasonable to assume that the imbalance will be expressed, to some degree, in the resolution, no matter what process is used. Litigation and negotiation may be no more effective than mediation in erasing power imbalances. To ask the mediation process to correct serious, long-standing, socially-created substantive inequities is simply unrealistic.

Attorney representation has been found to be a factor in improving

¹³⁵ Herman et al., *supra* note 107, at 146.

¹³⁶ Nader, *supra* note 1, at 13.

¹³⁷ *Id.*

results for parties, both in adjudication and mediation.¹³⁸ The poor are rarely able to afford counsel, and publicly funded legal services organizations do not have the resources to meet the legal needs of many low-income people.¹³⁹ Therefore, it is reasonable to conclude that people with inadequate financial resources, who are unable to hire counsel, would be vulnerable to undesirable outcomes in mediation.

Despite the risks of mediation, those unable to hire counsel may prefer an informal process to a court trial. Self-representation in court is extremely difficult to do effectively. Legally unsophisticated parties do not know the rules of evidence, may not prepare the case properly, do not know how to question and cross-examine witnesses, and are at a great disadvantage in researching and interpreting the law. The risks to the poor in mediation certainly do not disappear in litigation or negotiation.¹⁴⁰

Landlord-tenant cases are given as examples of situations involving an inherent power imbalance,¹⁴¹ in which mediation should be avoided. The Ohio State University program mediates some eviction cases.¹⁴² There is no question that most tenants facing eviction have little power, and most are unrepresented. In addition, Ohio law gives tenants procedural protections,¹⁴³ but defenses to eviction based upon non-payment of rent are few and must be raised by counterclaim.¹⁴⁴ If a tenant has objections to the condition of the premises, rent escrow¹⁴⁵ is the safest option. The powerless

¹³⁸ Hermann et al., *supra* note 107, at 92-95. Collection cases are one category in which legal representation does not tend to improve results for the defendants.

¹³⁹ AMERICAN BAR ASSOCIATION, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM 47-48, 56 (1992).

¹⁴⁰ A number of municipal court judges in our program refer cases involving a represented party (usually the plaintiff) against an unrepresented party to mediation. From my limited experience with these cases, I think a reasonably legally sophisticated mediator can *at times* assist the unrepresented party in obtaining a more satisfactory resolution in comparison to situations in which that party is left on his or her own to negotiate a solution with the attorney. Not surprisingly, attorney resistance to referral of cases to mediation is common in these types of cases.

¹⁴¹ Hermann et al., *supra* note 107, at 3-4 citing Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 5 WIS. L. REV. 1359 (1985).

¹⁴² Usually the court refers cases when both parties are unrepresented.

¹⁴³ See OHIO REV. CODE ANN. §§ 1923.04 (notice and service), 1923.06 (summons), 1923.07 (proceedings if defendant fails to appear), 1923.10 (trial by jury) (Baldwin's 1994).

¹⁴⁴ OHIO REV. CODE ANN. § 1923.061(B) (Baldwin's 1994).

¹⁴⁵ OHIO REV. CODE § 5321.07(B)(1) (Baldwin's 1988). See *Martins Ferry Jaycee Housing, Inc. v. Pawlaczyk*, 448 N.E.2d 512 (Ohio Ct. App. 1982) (disallowing testimony regarding condition of the premises as a defense to an eviction action filed for non-payment of

position of the tenant is a reflection of society's choice to protect the landlord's interest in receiving rent, with little attention given to the reasons for the tenant's non-payment. The effects of this policy decision are reflected in eviction court decisions. Not surprisingly, mediation generally can do little to significantly change the status quo. A landlord who knows he can do well in court is unlikely to give up this advantage in mediation.

Experience teaches that there is a risk that an unsophisticated mediator will unwittingly do nothing to challenge domination of the negotiations by the more powerful party, thus perpetuating imbalances. However, even a naive mediator is unlikely to leave the tenant in any worse position than would result from unassisted negotiations.

Power has many sources, both from inside and outside the individual. Differences in personality are important. Some people take risks; others are risk-averse. People differ in negotiating experience and effectiveness. Wealth, status, and education are sources of power. Public opinion can be a source of influence. Legal rights are a major source of power. For example, a wealthy, risk-taking party who does not fear public opinion can spend plenty of money prosecuting a losing lawsuit, hoping to force the other party into an undeserved settlement. A consumer armed with statutes providing for treble damages and attorney fees may be able to aggressively litigate or favorably settle a dispute with a small business.

Some examples drawn from actual cases handled in The Ohio State University program may help illustrate the points discussed above. Our program handled a product delivery dispute between a customer and a business. Due to a misunderstanding concerning payment arrangements, the consumer stopped payment on the check and refused delivery. The terms of the sales contract made it highly probable that the business would win in litigation. However, the business owner was very concerned with maintaining good customer relations. When an apology and promise to deliver the next day did not satisfy the customer, the owner gave her a free upgrade to a much more expensive item, a promise of its personal delivery, and individualized use instruction and monitoring. The legally and factually "powerless" consumer ended up with a far better outcome than she ever could have obtained in court.

We also mediated a dispute between a professional, white male landlord and a much younger, less educated, less wealthy, black male tenant. The dispute arose, in part, over costs incurred by the tenant when he was forced to vacate the apartment for a few days while a utility service made repairs. The landlord was not at fault for the disruption in the provision of the utility. Even so, the tenant left mediation with a favorable settlement.

The cases recounted above may be atypical. Perhaps further study will

show that mediation is too dangerous to the disadvantaged to continue its use. However, the evidence to date does not warrant the wholesale abandonment of mediation as a dispute resolution technique. The factors influencing power and powerlessness also influence the outcomes of litigation and negotiation. None of these factors disappear in the mediation setting. The forum in which the dispute is resolved does not necessarily shift pre-existing power differentials. Denying mediation based upon the assumption of difference or powerlessness will remove an avenue of dispute resolution from some people who would like and benefit from it.

Critics of mediation also fear that piecemeal settlements of systemic problems will sap the collective energy needed to generate broad social change. The privacy of the process can hide widespread problems from public view. Individual resolutions remove an impetus to organize for larger changes.¹⁴⁶

Grassroots efforts at social change can create benefits for many. Mediated settlements may benefit only a few. However, individual settlements have advantages. Pressing for generalized solutions has disadvantages. Large scale organizing is complex and takes a lot of time. The responding party may be more resistant to implement changes for large scale problems than to resolve one dispute without creating a precedent. Persons who forego individual settlements to advocate for a group solution may end up sacrificing their immediate interests for the hope of future collective gain.¹⁴⁷ They may not wish to take this risk.

Jennifer Beer notes that participants in mediation lack interest in cases similar to their own, except as validation for their own claims.¹⁴⁸ Others use evidence of widespread problems as one more reason to be hopeless about crafting an effective long-term solution.¹⁴⁹ These attitudes indicate that apathy is a complex problem. The availability of mediation does not threaten a non-existent interest in group advocacy.

C. Mediation, Mind Control, and Lawyers

Professor Nader wonders why lawyers have been so quick to embrace mediation.¹⁵⁰ She explains the asserted co-optation of lawyers by drawing an analogy between the promotion of mediation and the suppression of

¹⁴⁶ BEER, *supra* note 15, at 220.

¹⁴⁷ Richard Hofrichter, *Neighborhood Justice and the Social Control Problems of American Capitalism: A Perspective*, in 1 THE POLITICS OF INFORMAL JUSTICE 207, 240 (R. Abeled ed., 1982).

¹⁴⁸ BEER, *supra* note 15, at 220.

¹⁴⁹ *Id.*

¹⁵⁰ Nader, *supra* note 1, at 1.

discord and emphasis on conformity found in large law firm culture.¹⁵¹ She hypothesizes that the culture of large law firms suppresses the expression of criticism of working conditions by young associates.¹⁵² This silencing of dissent leads to burn-out and inability to defend one's own profession against attack by advocates of private, informal dispute resolution.¹⁵³ The accuracy of the assumption that lawyers have rushed to jump on the mediation bandwagon will be addressed below, followed by a discussion of the underlying argument.

Many commentators note that mediation is still not commonly used by lawyers.¹⁵⁴ If lawyers have, in fact, been charmed by the rhetoric of dispute resolution, voluntary use of alternative dispute resolution processes would be much greater than it is, and mandates to use mediation would be unnecessary. A number of explanations have been advanced to explain lawyers' failure to use mediation in cases in which settlement is an attractive option.¹⁵⁵ Lack of knowledge about the benefits and risks of mediation is a

¹⁵¹ Nader, *supra* note 1, at 20-23.

¹⁵² *Id.* at 14.

¹⁵³ *Id.* at 1, 3.

¹⁵⁴ See generally Edward A. Dauer, *Impediments to ADR*, 18 COLO. LAW. 839 (1989); STEVEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 422 (1992); JOHN P. MCCRORY, *INTRODUCTION TO A STUDY OF BARRIERS TO THE USE OF ALTERNATIVE METHODS OF DISPUTE RESOLUTION* i-iii (1984); Debra L. Shapiro & Deborah M. Kolb, *Reducing the Litigious Mentality by Increasing Employees' Desire to Communicate Grievances*, in *THE LEGALISTIC ORGANIZATION* 312-20 (Sim B. Sitkin & Robert J. Bies eds., 1994).

¹⁵⁵ Oilda M. Salazar, *Resistance to Mediation Within the Legal Profession*, in *MEDIATION: CONTEXT AND CHALLENGES* 125 (Joseph E. Polenski & Harold M. Launer eds., 1986); Paul V. Olczak, *Resistance to Mediation: A Socio-Clinical Analysis*, *COMMUNITY MEDIATION: A HANDBOOK FOR PRACTITIONERS AND RESEARCHERS* 153, 162-63 (Karen G. Duffy et al. eds., 1991). Dauer, *supra* note 154, at 840, 841, notes that lawyers may erroneously perceive that clients want aggressive litigation, that lawyers prefer litigation to ADR, and that they fail to see the advantages of ADR. Deanne C. Siemer notes attorney concern over losing control of the case, fear of exposing the client, risk of losing fees, fear of free discovery or appearing too eager to settle, setting unrealistic settlement ranges, working on unrealistic timetables, fear of wasting time, and concern about communications to the judge as factors biasing lawyers against ADR. *Perspective of Advocates and Clients on Court-Sponsored ADR*, in *EMERGING ADR ISSUES IN STATE AND FEDERAL COURTS* 166, 168-75 (Frank E.A. Sander ed., 1991).

Speaking from experience, my partners in law practice did not hesitate to question my judgment when I took a forty-hour divorce mediation training course. In the past few years, I have seen some change in attitude as attorneys have been exposed to mediation and liked the results. Even so, the pace of change has been slow.

common theory used to explain limited use of mediation by lawyers.¹⁵⁶ For example, lawyers may confuse mediation with arbitration.¹⁵⁷ Speaking from experience, many lawyers also tend to assume that mediation is the same thing as attorney negotiation, or that it has no advantage over negotiation. Failure to understand the distinction between the two processes would tend to make the lawyer feel mediation would be neither necessary nor helpful. Lack of practical experience with mediation could also make a lawyer feel very uncomfortable with recommending its use to a client.

Another reason advanced for limited use of mediation by lawyers concerns the process of legal education. Law schools focus on training students to maneuver within the court system. The emphasis is on the adversarial system as the only accepted method for the resolution of disputes. In direct contrast to Professor Nader's assertion that legal education makes law students easy prey to the rhetoric of peace and harmony,¹⁵⁸ others argue that the law school socialization process indoctrinates aspiring attorneys with an adversarial, win-lose mentality.¹⁵⁹ Clearly, both arguments cannot be correct. Random review of course catalogs from law schools should show relatively few courses focusing on dispute resolution, in comparison to courses emphasizing substantive law, derived from court decisions and statutes. In sum, the assertion that lawyers have bought into alternative dispute resolution in a wholesale fashion is belied by the evidence and norms of legal culture.

Professor Nader uses a law firm ethnography to show that hierarchy and social control inhibit the development and expression of complaints about working conditions.¹⁶⁰ In the study, she describes the way in which junior associates are induced to work long hours and sacrifice their personal lives to the revenue generation needs of the firm.¹⁶¹

Nader states that lawyers "are particularly susceptible to the kinds of control effects documented in cults" due to their long work hours and little contact with the outside world.¹⁶² She provides no evidence for this conclusion. Indeed, it requires quite a leap of logic to analogize the practice of law to thought control programs.

¹⁵⁶ GOLDBERG ET AL., *supra* note 143, at 422; Dauer, *supra* note 154, at 841.

¹⁵⁷ Dauer, *supra* note 154, at 841.

¹⁵⁸ Nader, *supra* note 1, at 3.

¹⁵⁹ Salazar, *supra* note 155, at 126-27; OLCZAK, *supra* note 146, at 163; Leonard Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43-46 (1982); Edward Sutton, *Alternative Methods of Dispute Resolution and Legal Education*, in A STUDY OF BARRIERS TO THE USE OF ALTERNATIVE METHODS OF DISPUTE RESOLUTION 219, 223 (1984).

¹⁶⁰ Nader, *supra* note 1, at 14-17.

¹⁶¹ *Id.*

¹⁶² *Id.* at 3, 4.

The goal of a true thought control program is to change the individual to serve "a hidden organizational purpose."¹⁶³ This is done by undermining the individual's basic self-concept and beliefs.¹⁶⁴ According to researchers, thought control programs must include six conditions: (1) control over the person's time and thoughts, (2) controlling the environment, (3) creating a sense of powerlessness, (4) manipulating rewards and punishments to help learning the new ideology and to change behavior reflecting prior values, (5) maintaining a closed system of logic in which the person receives the message that any criticisms of those in power reflect his or her own errors or inadequacies, and (6) keeping the person ignorant of what is happening.¹⁶⁵ The data came from cults, therapeutic communities, and large group awareness trainings — not employment settings.

The most obvious difference between cult programming and law firms is simply that law firms lack hidden purposes — their function is to earn money by providing legal services to clients. Certainly law firms reward long hours and loyalty, since these relate to profits, but so do other employers. In addition, law firms do not seem to have enough control over their employees' time and thoughts to create blind loyalty to the organization, as shown by Nader's own reports of pointed criticisms of the organization made by employees, including associates, when anonymity was guaranteed.¹⁶⁶ She also notes that some lawyers in large firms leave or choose to work limited hours.¹⁶⁷ The practice of law in large firms may deserve hearty criticism, but to say law firms have the kind of control over employees as cults have over followers seems far-fetched.¹⁶⁸

There are alternative explanations for young associates' failure to voice complaints about working conditions. One factor inhibiting criticism is that employees who complain can often be retaliated against with impunity. With the exception of laws prohibiting employment discrimination on the basis of race, sex, national origin, religion,¹⁶⁹ age,¹⁷⁰ and handicap,¹⁷¹

¹⁶³ Margaret Thaler Singer & Richard Ofshe, *Thought Reform Programs and the Production of Psychiatric Casualties*, 20 PSYCHIATRIC ANNALS 188, 189-90 (1990).

¹⁶⁴ *Id.* at 189.

¹⁶⁵ *Id.* at 189-90.

¹⁶⁶ Nader, *supra* note 1, at 14, 16.

¹⁶⁷ *Id.* at 6.

¹⁶⁸ Many large firm lawyers I know freely voice criticisms of their firms. None show the anomie or significant psychological disturbances shown by persons leaving thought control programs, as discussed by Singer & Ofshe, *supra* note 163, at 191.

¹⁶⁹ See generally Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.* (1981).

¹⁷⁰ See generally Age Discrimination in Employment Act, 29 U.S.C. § 620 *et seq.* (1981).

¹⁷¹ See generally Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (1981).

employers are generally free to hire and fire at will.¹⁷² An associate seldom has meaningful protection against negative repercussions caused by voicing complaints. In addition, large law firm practice offers advantages, such as high pay¹⁷³ and challenging work.¹⁷⁴ Life in a large firm is not all bad.

Professor Nader does not tie her study of large law firm culture to law firm promotion of the use of alternative dispute resolution processes. It seems that lawyers in the large firm setting would have little incentive to blindly buy into the rhetoric of alternative dispute resolution. As Nader notes, large firms need to generate large numbers of billable hours in order to maintain profitability.¹⁷⁵ If a case settles in mediation, the client usually saves money, including future attorney fees.¹⁷⁶ The large firms have also developed large litigation sections, creating a possible institutional force towards increasing litigation.¹⁷⁷ Although attorneys should be concerned with minimizing costs to clients, firm economics could possibly create a disincentive for referrals to mediation by lawyers in large firms. Economic considerations, in concert with the other factors giving rise to resistance of alternative dispute resolution by lawyers, would seem to influence lawyers in large firms to reject the rhetoric of alternative dispute resolution, absent successful experiences with mediation.

Only a small percentage of lawyers work for the large firms Nader discusses. Most lawyers work for government, in public service positions, in small firms, and in solo practices.¹⁷⁸ These jobs do not require the hours and loyalty Nader describes, yet many of these lawyers see value in mediation.

Many lawyers who have embraced alternative dispute resolution have done so based on their perceptions of inadequacies in the traditional adversarial system. These perceptions are based upon their practical

¹⁷² See, e.g., *Stewart v. Jackson & Nash*, 976 F.2d 86, 88 (2d Cir. 1992) and cases cited therein, noting that fraud in the inducement of an employment relationship can create a cause of action, but that employers are generally free to fire employees without contracts for any or no cause. Young associates seldom have enough leverage to negotiate employment contracts with large firms.

¹⁷³ AMERICAN BAR ASSOCIATION, *supra* note 139, at 73.

¹⁷⁴ *Id.* at 75-76. The report also notes that the recent downsizing of many large firms created a temporary market glut of experienced lawyers.

¹⁷⁵ Nader, *supra* note 1, at 15.

¹⁷⁶ Erika S. Fine & Elizabeth S. Plapinger, *ADR Overview*, in *CONTAINING LEGAL COSTS* (Erika S. Fine & Elizabeth F. Plapinger eds., 1988); Salazar, *supra* note 154, at 130.

¹⁷⁷ GOLDBERG ET AL., *supra* note 154, at 423.

¹⁷⁸ Of the 71% of lawyers in private practice in 1988, only 14.6% practice in firms of 51 or more attorneys. When all practicing attorneys are counted, 10.5% work in large firms. AMERICAN BAR ASSOCIATION, *supra* note 139, at 33-34.

experiences with the court system. No institution is perfect — including the mediation systems now in place in many jurisdictions — and the adversarial system has flaws.

Litigation can be the best choice for certain cases. However, litigation carries risks. Trial preparation is time-consuming and therefore expensive. A judge or jury cannot be expected to completely agree with the perceptions and arguments of any of the parties to a case, for the simple reason that people rarely see events in the same way. Litigants lose a significant amount of control over the outcome of their case if it is decided by a judge. These considerations are certainly factors in favor of a negotiated resolution before trial.

Trial rates have dropped significantly over the last forty years.¹⁷⁹ It seems odd that trial rates would drop so dramatically if the practicing bar did not find good reasons to settle cases.

II. CONCLUSION

Influence and persuasion are fundamentally different from control. Professor Nader's critique fails to distinguish between the two. The law firm ethnography she uses to show the dangers of harmony ideology arises from a coercive setting.¹⁸⁰ The employing partners have great control over the fates of their employees. This control is a major factor in repressing the *expression* of critical ideas. However, power is not capable of repressing the critical *thoughts* themselves. When employees are guaranteed anonymity, they freely voice pointed criticisms of their firms.¹⁸¹

Professor Grillo's most gripping example of the dangers of bad mediation, the case of Kenny, is a composite drawn from a jurisdiction giving the mediator the power to make custody recommendations to the court if the mediation results in non-resolution.¹⁸² The story is an excellent argument against the implementation of this policy.¹⁸³

When coercion is absent, mediation looks different. Most participants are capable of "holding their own" during discussions, of expressing strong opinions and emotions, and of actively defending their interests. There is no guarantee that some people will not be overly susceptible to influence. However, experience shows that few people fail to stand up for themselves

¹⁷⁹ Galanter, *The Day After the Litigation Explosion*, *supra* note 29, at 8.

¹⁸⁰ Nader, *supra* note 1, at 14-20.

¹⁸¹ *Id.* at 16.

¹⁸² Grillo, *supra* note 66, at 1562, 1569, 1594.

¹⁸³ It also makes an excellent case for the inclusion of lawyers in divorce mediation, for critical dialogue concerning mediator training and education, and for peer review of mediator performance.

when free to do so.¹⁸⁴

Unlike Professor Nader,¹⁸⁵ I have no problem with encouraging a mediator to ask the parties if they have fully considered the consequences of the courses of action open to them. Have they discounted the value of settlement? What are their needs, as opposed to their positions? How might their needs be met? Often, resolution will involve compromises made by all sides. The real question is whether compromise makes sense, given the gains obtained in the trade-off. Thoughtful settlement advances self-determination; it can create true harmony. Coercive settlement produces only the appearance of harmony.

Discussion of the relative merits of adjudication and mediation reflects the tension between differing societal values and goals. On the one hand, our culture places great value on the protection of individual rights and freedoms. On the other hand, not all members of American society can get what they want. Often, accommodation of conflicting goals through compromise is necessary for the continued functioning of society. Assertion of rights has value. Compromise and accommodation among competing interests have value too. Our society needs to support avenues for both vindication of rights and mutual accommodation. Neither approach is inherently superior to the other. Ideally, the participants to a conflict are in the best position to decide whether to seek redress for complaints through the courts, or to settle the dispute in another way.

The fairness of mediation to members of traditionally disadvantaged groups is a serious issue. Although research shows high levels of participant satisfaction with the mediation process, it is not right to ask people to happily acquiesce in their own oppression. If further study shows mediation results are relatively unfair to certain groups, the process must be improved. If improvement is impossible, then the continued use of mediation should be re-evaluated. At present, the evidence of unfairness is not strong enough to support abandonment of the process.

Mediation has the potential to foster both resolution and repression. Proponents of mediation need to think critically and act carefully with respect to both program design and skills training, in order to maximize mediation's ability to help people achieve consensual resolution through free choice, rather than informally coerced assent. Mediation's transformative potential has real value. Mediators also need to recognize that not all cases can or should be settled. Adjudication may be a more appropriate choice for parties in some situations.

Mediation is imperfect. Negotiation is imperfect. Adjudication is

¹⁸⁴ See also BBER, *supra* note 15, at 228 (stating that, "Few people are willing to lay themselves out like a rug for the other party to walk over.").

¹⁸⁵ Nader, *supra* note 1, at 12.

imperfect. Rather than discard any of these options, we should examine the shortcomings of all, and make changes in all, where change will appear to do good. This may help make better options for dispute resolution available to more members of society.